United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1926

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1926

UNITED STATES OF AMERICA
ex rel. DONALD E. RAMSEY,
Relator-Appellant

-against-

LEON VINCENT, Superintendent,
Green Haven State Correctional
Facility, Stormville, New York,
Respondent-Appellee.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RELATOR-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Introductory Statement

Relator Donald E. Ramsey ("Ramsey") appeals from the decision rendered on May 10, 1974, by Hon. Marvin E. Frankel, U.S.D.J., United States District Court for the Southern District of New York, after hearing, denying his petition for a writ of habeas corpus from a judgment of conviction of the crime of Robbery in the First Degree (Penal Law § 160.15) after jury trial before

Justice John Murtagh in the New York Supreme Court, New York County. The sole basis for the petition for habeas corpus, and the exclusive basis upon which reversal of the District Court's decision is urged here, is that Ramsey's counsel, who represented him at his February 1968 trial in connection with the robbery charge, was so incompetent that Ramsey was denied his rights to the effective assistance of counsel guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Statement of Issues Presented for Review

The issues on this appeal are:

(1) Whether the representation of Ramsey by his counsel in connection with his trial was so inept and incompetent as to render his trial a mockery of justice and to deprive him of his constitutional right to effective assistance of counsel.

(2) Whether the District Court's finding that the representation of Ramsey by his counsel met the constitutional minimum was not clearly erroneous.

Statement of Facts

Early in the morning of October 8, 1967, the bodies of Linda Rae Fitzpatrick, the runaway daughter of a wealthy Connecticut businessman, and James L. Hutchinson were discovered in the squalid basement of a tenement located at 169 Avenue B in Manhattan's Lower East Side. The murders were particularly brutal in nature and the apparent sense-

lessness and heinousness of the killings, as well as the stark contrast between Miss Fitzpatrick's Greenwich, Connecticut and Greenwich Village lifestyles, made a sensational, if sordid, story. The news media throughout the nation covered the story extensively. In New York City the coverage was particularly intensive and included a great number of feature stories about the circumstances surrounding Miss Fitzpatrick's dramatic rejection of middle-class mores and the details of the murders themselves.*

By the morning of October 9, 1967, Ramsey, who resided in the building where the bodies were found, had been taken into custody and charged with the double homicide as well as the almost contemporaneous rape of a second woman. In October, shortly after Ramsey's arrest and subsequent incarceration, Joseph Domanti, a New York attorney, approached Ramsey, for whom a Legal Aid attorney had already been appointed, and offered his services as an attorney (12a, 139a). Ramsey who then had only a ninth grade education (9a) and who mistakenly thought that his Legal Aid attorney was connected with the prosecution (Levit Affidavit at Exhibit 1, ¶1), readily consented to be represented by Mr. Domanti (12a).

On November 3, 1967, an indictment was filed charging Ramsey and one Randolph Leak with a September 22, 1967 armed robbery of the Project Liquor Store located at 63 Avenue D

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* A number of these articles were submitted to the District Court as Exhibit 5 to the Levit Affidavit contained in Supplementary Affidavits in Support of Petition for Habeus Corpus (hereafter "Levit Affidavit").

also in lower Manhattan (Petitioner's Ex. 2, 143a) On November 21, 1967, Mr. Domanti filed a notice of appearance in Ramsey's behalf in connection with the robbery (Petitioner's Ex. 3), although it is probable that Ramsey neither received a copy of the indictment nor was informed of those charges by Mr. Domanti until November 28, 1967, when he and Mr. Domanti appeared in Court at 100 Centre Street where Ramsey entered his plea of not guilty (23a-27a, 146a-151a).

Ramsey was tried before a jury on the felony charge of Robbery in the First Degree between February 26 and March 1, 1968. He was convicted as charged and sentenced on March 30, 1968 to a minimum of eight and one-third, and a maximum of twenty-five, years in prison.

No timely appeal was brought in Ramsey's behalf by Mr. Domanti (49a-51a, 124a-125a). However, in 1969 Ramsey, with the aid of new counsel, applied for a writ of error coram nobis (51a).

Justice Murtagh considered the failure to appeal Ramsey's case so egregious that the writ was granted on September 23, 1969 after a hearing on July 29, 1969 at which Mr. Domanti, Ramsey and Mrs. Ramsey testified about the circumstances surrounding Mr. Domanti's failure so to appeal. Ramsey was resentenced by Justice Murtagh to an identical term, from which a timely appeal was taken.

Subsequent Proceedings

State Proceedings

Ramsey's robbery conviction was unanimously affirmed without opinion by the Appellate Division on September 22, 1970, 314 N.Y.S. 2d 700 (1st Dept. 1970). Leave to appeal to the New York Court of Appeals was denied by Judge John F. Scileppi on November 11, 1970.

In July, 1972, Ramsey moved pro se and pursuant to the New York Criminal Procedure Law § 440.1(1)(h) to vacate the judgment of conviction entered against him or, in the alternative, to have counsel assigned and a hearing held on the ground that the judgment was obtained in violation of his rights under the United States Constitution because at trial he was denied the effective assistance of counsel. In an unreported memorandum opinion dated July 27, 1972, Justice Sidney A. Fine denied Ramsey's motion in all respects on the ground that New York Criminal Procedure Law § 440.10(2)(c) required him to raise the issue of ineffective assistance of counsel on direct appeal.* In dictum, Justice Fine stated that on the merits, Ramsey's claim was without basis.

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* In its decision below the District Court raised, but did not decide, the issue of whether Ramsey had exhausted state remedies with respect to the issue of counsel's

On August 7, 1972, Ramsey filed a Request for a Certificate Granting Leave to Appeal to the Appellate Division, First Department. By order dated September 7, 1972, Justice James B. McNally of that Court denied Ramsey's Request.

By letter dated September 11, 1972, Ramsey applied to Chief Judge Fuld for permission to appeal to the New York Court of Appeals. The Court of Appeals informed Ramsey on September 13, 1972 that it lacked power to grant permission to appeal from the Appellate Division's order denying permission to appeal to the Appellate Division.

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failure to request a change of venue or otherwise avoid the effects of extensive pretrial publicity (237a-238a). In Ramsey's original memorandum of law submitted to the New York Supreme Court in connection with his application for vacation of the judgment, this issue was in fact squarely addressed (240a-241a). Moreover, it is clear from Justice Fine's decision that the issue could not in any event have been considered by the court in deciding Ramsey's collateral state attack.

Ramsey has raised in state court, by affidavit and memorandum of law, all of the facts surrounding the issue of prejudicial publicity and Mr. Domanti's inaction with respect thereto. Although this issue was not presented on direct appeal, it was included in Ramsey's collateral state attack and there is no requirement that it be presented a second time below. Moreover, although none of the state courts which ruled on Ramsey's collateral claims decided them on the merits, that the claim has been presented is sufficient, and futile, repetitive presentations are not required. See, e.g. Fay v. Noia, 372 U.S. 391 (1963); Coleman v. Maxwell, 351 F.2d 285, 286 (6th Cir. 1965), cert. denied 393 U.S. 1007 (1968); McIntrye v. New York, 329 F. Supp. 9, 10-11 (E.D.N.Y. 1971).

The Decision Below

On November 2, 1972 Ramsey filed, again pro se, a petition for writ of habeas corpus in the United States District Court for the Southern District of New York. Ramsey's petition was based on the identical claim raised in his collateral state proceeding--that he had been deprived of his constitutional right to effective assistance of counsel at trial. Counsel was subsequently appointed to assist Ramsey and an evidentiary hearing was held on April 24 and 25, 1974. On May 10, 1974 Judge Frankel denied and dismissed Ramsey's petition, holding that Ramsey's contentions with respect to the quality of Mr. Domanti's performance were not meritorious. The District Court noted, however, that it had reached its conclusion "with less than absolute certainty" (238a).

ARGUMENT

Ramsey's Representation Was So Woefully Inadequate as to Deprive Him of Effective Assistance of Counsel in Contravention of the Fifth, Sixth and Fourteenth Amendments

The requirements of this Circuit for establishing a claim of inadequacy of counsel are stringent. Mere

tactical errors or strategic mistakes at trial are an insufficient basis for the granting of the writ. United States ex rel. Testamark v. Vincent, No. 73-636 (2d Cir., May 8, 1974); United States ex rel. Marcelin v. Mancusi, 462 F. 2d 36, 42-43 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973); United States v. Matalon, 445 F.2d 1215, 1215-18 (2d Cir.), cert. denied, 404 U.S. 853 (1971). "[E]rror-less counsel" is not required, United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963), and for relief such as Ramsey requests in the instant case, "counsel's representation must be so 'horribly inept' as to amount to 'a breach of his legal duty faithfully to represent his client's interests'". United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971) quoting from United States ex rel. Maselli v. Reinecke, 383 F.2d 129, 132 (2d Cir. 1967).

The standards set forth, however, are not hollow ones. If it is clear from the facts of a case that the efforts of counsel were so inadequate that his client was not accorded the assistance the Constitution guarantees, then the writ must issue. The record in this case reveals such inadequacy. Mr. Domanti's errors and omissions far exceed in scope and substance those permissible mistakes illustrated by the cases. The result of such glaring errors and

omissions was that, as an objective matter, Mr. Domanti must be deemed to have failed "faithfully to represent his client's interests". The fundamental fairness that is essential to due process was violated in Ramsey's trial. It was a reversible error for the District Court to hold otherwise.*

A. Counsel's Failure to Prepare for Ramsey's Trial.

Mr. Domanti, who had been a member of the New York Bar for some six years prior to his becoming counsel to Ramsey, operated a "storefront" office in Greenwich Village and had a practice among the persons he characterized as "hippies" in that area (104a-106a). His criminal experience in New York Supreme Court had been extremely limited (126a), and most of his practice involved nonjury misdemeanor trials in Manhattan Criminal Court (105a, 127a). Mr. Domanti testified that he thought that

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*Moreover, the case against Ramsey was not so overwhelming, nor the evidence so airtight, that even hypothetically perfect counsel could not have succeeded. United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 43-44 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973); United States ex rel. Crispin v. Mancusi, 448 F.2d 233, 234 (2d Cir.), cert. denied, 404 U.S. 967 (1971); United States v. Katz, 425 F.2d 928, 930 (2d Cir. 1970). Ramsey was convicted essentially on the strength of two identifications by eyewitnesses, one or both of which were arguably subject to objection and exlusion (see Point B infra). No weapon was ever produced nor found in Ramsey's possession nor were any of the fruits of the crime recovered from him. Ramsey was not charged with the crime for several weeks after its occurrence. See United States ex rel. Marcelin v. Mancusi, supra at 43.

before the Ramsey trial he had tried only one felony case to a jury, although he could not recall the case itself or when it had occurred (126a-127a). The well publicized case of Donald Ramsey, which eventually involved charges of four felonies (two homicides, a rape and the robbery), was the most heavily publicized, most notorious case Mr. Domanti had ever handled (140a). Mr. Domanti's practice was then being subsidized by his parents (161a). Yet, Mr. Domanti told Ramsey no fee would be charged and none was ever requested or paid (13a-14a). Mr. Domanti contended stoutly that he did not take Ramsey's case for its publicity value or to enhance his reputation (161a-164a). Yet, the clear inference from the record is to the contrary, and it was error for the District Court to ignore it.

Mr. Domanti testified that he visited Ramsey a number of times in prison prior to his trial for the robbery but that most of these visits were to discuss the other crimes for which Ramsey had been indicted (107a, 195a), and which Mr. Domanti considered to be more important (196a). These visits had tapered off by December, 1967, and were virtually non-existent before the trial (44-45a, 176a, 185a-186a).

During these visits Ramsey gave to Mr. Domanti the names of at least three possible witnesses. Two were at his home with him and his wife the night of the robbery. One witnessed a fight between Ramsey and one of the store-clerk witnesses,

Jose Roman (31a-35a). Mr. Domanti could not recall whether any of these names were "Anglo-Saxon" (109a-110a)*, nor whether he ever had sufficient information about any of them to reach them (Id.). He seems to have relied upon Ramsey's wife, whom he characterized as a "very, very nervous girl," "very, very fearful at the time" (119a) to do his footwork for him (112a-113a, 117a-119a, 188a). What independent efforts counsel made to find these persons are vague, if indeed any were made at all.** Moreover, Mr. Domanti claimed that one of these witnesses had stepped forward and volunteered to testify that he was with Ramsey "if I have to" (111a), but that he subsequently declined such aid (111a-112a). Counsel refused to make use of Ramsey's wife at trial (although she was present throughout it (99a) and she willingly testified in his behalf at the hearing in the District Court, on the ground that she did not want to testify (118a). Counsel testified that she gave no explanation for her alleged unwillingness to testify, but he did not inquire as to her reasons for her alleged refusal (Id.). Yet, he had no reluctance about relying on this allegedly unsteady

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* Counsel did recall the name of James Reed, the witness to the fight (110a, 168a-169a).

** Counsel claims to have spent a number of evenings roaming the Village in search of friends of Ramsey. Most of this effort was devoted to the investigation of the murder charges (119a, 120a, 195a).

girl to find the key witnesses and to produce certain checks cashed at the liquor store that he expected would exonerate Ramsey (112-113a, 117a-119a, 175a). Additionally Mr. Domanti had her make a furious effort during a trial recess to produce the witnesses (186a-188a), but when she reported her lack of success, counsel did not take the simple step of requesting an adjournment of the trial (186a).

At the trial only Ramsey was called to testify in his own behalf and ostensibly only to identify certain checks cashed by him in the Project Liquor Store in order to further Mr. Domanti's apparent strategem* that Ramsey would not have robbed the store in which he was known. Ramsey was placed on the stand with minimal, if indeed any preparation, for Mr. Domanti testified that he did not want Ramsey's testimony to appear "too rehearsed" and that he thought he would "come over very well as a witness" (124a, 35a-39a). Moreover, counsel had not even visited Ramsey for three full weeks prior to the trial nor between trial sessions (185a-186a), although he testified that Ramsey was fully prepared to handle both direct and cross examination (176a), and even though Ramsey testified that he had never testified in court before prior

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*The checks were not even produced until after the trial began and shortly before Ramsey was placed on the stand (36a). What counsel's strategy prior to that event was, given the absence of the alibi witnesses, remains unknown. Mr. Domanti merely testified that he was always "hopeful that Donald would have been acquitted" (173a).

to his trial in this case (10a). In sum, counsel had limited, if any strategy at all prepared for Ramsey who was facing a sentence which carried a penalty of up to twenty-five years in state prison, a sentence he in fact received.

Mr. Domanti's total lack of preparation for Ramsey's trial and the utter absence of any coherent defense strategy are evident from the record. It was reversible error for the District Court to determine that counsel's efforts in this regard were constitutionally sufficient.

B. Counsel's Failure to Obtain a Wade hearing or to Object to Possibly Prejudicial Identifications.

On the night of October 9, 1967, Ramsey was taken into custody as a prime suspect in the Fitzpatrick-Hutchinson murders. On that day, one Detective Franzia, the police officer in charge of the investigation of the Project Liquor Store robbery and who knew that Ramsey was in custody and might possibly have been the suspect identified from photographs shown to both witnesses, (Trial Tr. 36-39, 51-53, 68-70), drove to the home of witness Jose Roman and brought him back to the 9th Precinct where Ramsey was being held in order to have Roman "take a look" at a few persons that fit the description of one of the robbers earlier furnished by Roman (Trial Tr. 79, 76-79). Detective Franzia led Roman to a

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* All references to "Trial Tr." are to the minutes of Ramsey's February, 1968 trial in the New York Supreme Court, New York County.

small room, told him to wait for his return, and exited through one of the two doors at either end of the room (Trial Tr. 77, 80-91).

As Roman awaited Detective Franzia's return, Ramsey passed through the room, followed by a second person. Thereafter four other blacks filed past (Trial Tr. 82-84, 87-95).

Approximately 15 minutes later, Detective Franzia returned and Roman informed him that he had "just seen the one that robbed us" (Trial Tr. 81, 85) and that person was the first one to pass through the room (Trial Tr. 97). Thereafter Roman was taken home.

Ramsey's counsel did not seek to obtain for his client a hearing with respect to this possibly prejudicial identification, even though counsel for Ramsey's then co-defendant did seek and obtain such hearing and even though such a hearing was available in New York under then current procedures and Ramsey's counsel would have only had to make an oral application for such proceeding (171a). See People v. Ballott, 20 N.Y. 2d 600, 286 N.Y.S. 2d 1 (1967). Moreover, Mr. Domanti testified that he knew during the time prior to Ramsey's trial that he could have obtained a Wade hearing by simply requesting one, or that he could have joined in the application made on behalf of Ramsey's

co-defendant (171a-172a).* However, Mr. Domanti's failure to confer with such counsel effectively precluded this latter option. Mr. Domanti testified that he did not ask for a Wade hearing because:

> "At the time I didn't think it was that important. That may have been an error in judgment but I didn't think at that time it was important. I had the impression that the identifications were pretty solid and had a hearing been held it probably would have been denied. But again, maybe I should have." (121a)

Further, Mr. Domanti did not even seek to protect the record at trial by objecting to Roman's testimony with respect to such identification made at the precinct and without the presence of counsel because at that time he was "hopeful that Donald would be acquitted"** (172a-173a). Ephemeral hopes such as Mr. Domanti harbored here should not be permitted to substitute for actual advocacy and effective representation.

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* Counsel apparently scarcely conferred with counsel for Randolph Leak (165a-168a). Leak's case was severed from Ramsey's by the People (because of a conflict between the witnesses) and dismissed at the instance of the People in 1969 (166a). Leak's counsel had requested a Wade hearing by motion dated December 29, 1967 (Levit Affidavit at Exhibit 4). See United States v. DeCoster, 487 F.2d 1197, 1200 (D.C. Cir. 1973).

** Mr. Domanti did not even make the basic request for the grand jury minutes in order to determine whether there were any possible discrepancies between the witnesses' testimony before the grand jury and at trial. Mr. Domanti testified that he "knew at the time that I had the right to see them but I don't know why I didn't." (171a)

On the evening of October 8, 1967, Ramsey was in custody and under arrest for the double homicide which had occurred the previous day. A "critical stage" had commenced with respect to Ramsey as the prosecutorial process had begun to focus on him as the prime suspect in a criminal case. When Roman was brought to the precinct by Detective Franzia, both were well aware that the purpose of the visit was to identify a suspect (Trial Tr. 79). Ramsey was paraded before Roman without any knowledge or warning that he was then being singled out as the perpetrator of an unrelated crime which had occurred some two weeks earlier, if indeed he was ever aware, prior to trial, of Roman's presence in the precinct at that time. More importantly, Ramsey had no counsel present during this calculated walk-by for the purpose of protecting his rights, nor had Ramsey been informed of his rights to such counsel at this critical stage. See United States v. Wade, 388 U.S. 218 (1967) and United States v. Ayers, 426 F.2d 524 (2d Cir.), cert. denied, 400 U.S. 842 (1970):

> "This defendant should have been told that there was to be a lineup for the purpose of possible identification and that he was entitled to have his lawyer or one provided by the State present at the lineup." 426 F.2d at 527.

At trial, Roman again picked out Ramsey as the person who had robbed the Project Liquor Store (Trial Tr.

43). This in-court identification was crucial evidence linking Ramsey to the crime, for Ramsey testified that he was elsewhere on that day and neither a weapon nor any fruits of the crime were ever recovered.

Although there is no per se rule of exclusion of courtroom identifications, United States v. Wade, 388 U.S. at 240, it is clear that in view of the occurrence of an unconstitutional show-up such as the police staged here, the People should have been compelled to establish by "clear and convincing evidence" that the in-court identification was based on observations of the defendant extrinsic to the line-up. People v. Ballott, 20 N.Y. 2d 600, 606, 286 N.Y.S.2d 1, 6 (1967). No effort was made by Mr. Domanti to determine whether the People's identification had been tainted.

Whether Ramsey had a constitutional right to counsel at the precinct walk-by after he had been arrested as a suspect in the Fitzpatrick-Hutchinson murders but before he had been charged in the Project Liquor Store robbery is not directly at issue here. The landmark

cases of United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967)* establish a right to counsel at the "critical stage" of a formal post-indictment lineup. Kirby v. Illinois, 406 U.S. 682 (1972), has limited the then expanding development of the Wade-Gilbert line of cases to situations "at or after the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information or arraignment". 406 U.S. at 689. Here the viewing of Ramsey on October 8, 1967 was in connection with the crime testified to by the identifying witness, but while Ramsey was already in custody and awaiting arraignment on another crime. It is arguable, therefore, that in this situation, Wade and Gilbert still would require counsel at the viewing, even within the strictures established by Kirby. See, Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972). In any event, Kirby

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*In Stovall v. Denno, 388 U.S. 293 (1967), the Supreme Court held that the constitutional rule established in Wade and Gilbert was to be applied prospectively only to confrontations for identification purposes made in the absence of counsel occurring after the date of those decisions, June 12, 1967. All identifications of Ramsey occurred on or after October 8, 1967, and Mr. Domanti testified as to his full awareness of the Wade-Gilbert cases (128a).

is distinguishable on the ground that the viewing there consisted of a face-to-face confrontation between accuser and accused - not a surreptitious show-up - in which not even Ramsey, the accused, let alone counsel, was informed, that it was taking place. Indeed, even in Kirby the Court noted that:

> "What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. As the Court pointed out in Wade itself, it is always necessary to 'scrutinize any pretrial confrontation'. . . ." (Citation omitted) 406 U.S. at 690-91 (Emphasis in original.)

At the time Roman was brought into the precinct to view Ramsey, he was already in custody. Counsel already had been or would soon be found for him. The witnesses in the case were known to the police and easily and readily available. There was no reason therefore not to delay any identification procedure to such time when Ramsey's attorney could be present. The procedures involved in the precinct show-up in this case "were most informal, heightening the possibility of suggestiveness and making a faithful reconstruction of what happened at trial difficult or even impossible'." Saltys v. Adams, 465 F.2d

at 1027, quoting United States v. Roth, 430 F.2 1137, 1141 (2d Cir. 1970), cert. denied, 400 U.S. 1021 (1971). This covert confrontation between Ramsey and Roman was a "critical stage" in the prosecution because Ramsey was suspected of complicity in the liquor store robbery, was obviously in custody (although for an unrelated crime as was the case in Saltys*) and had been identified in photographs earlier by both witnesses who subsequently viewed him in person.** The identification proceeding was, therefore, arguably at a point "where the results might well settle the accused's fate and reduce the trial itself to mere formality". United States v. Wade, 388 U.S. at 224.

If Wade applies, Roman's testimony that he had identified Ramsey in the Precinct should have been excluded at trial without inquiry into whether such testimony had an

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* While Saltys was being detained, together with other arrestees, in a "bullpen" pending arraignment on an unrelated charge, he was identified as the perpetrator of a robbery by two individuals who had previously identified his photo as "resembling" the robber. The identification confrontation was conducted without notice to Saltys or his counsel, retained to represent him at the arraignment on the unrelated charge. At Saltys' trial on the robbery charge, the pretrial identifications were introduced in evidence.

** Philip Epstein, the second clerk, viewed Ramsey once at 100 Centre Street during the course of an unrelated proceeding (Epstein Affidavit dated March 6, 1974). Counsel made no effort to investigate whether this identification was subject to objection.

independent source. Yet Mr. Domanti made no such motion, nor did he take even the "rudimentary step" of seeking a suppression hearing in the absence of the jury to explore the evidence underlying the proposed in-court identification evidence of either of the two witnesses. Nor did Mr. Domanti even know why he failed to explore this viable line of defense either before or during the trial (173a).

In sum, irrespective of any limitations imposed on Wade by Kirby and indeed, in spite of them, "there was plainly [in 1968] a highly viable Wade and Gilbert argument available to him [counsel] - a line of defense that prior to Kirby might have been impregnable." Saltys v. Adams, 465 F.2d 1023, 1028 (2d Cir. 1972); United States v. Roth, 430 F.2d 1137 (2d Cir. 1970), cert. denied, 400 U.S. 1021 (1971); United States v. Ayers, 426 F.2d 524 (2d Cir.), cert. denied, 400 U.S. 842 (1970). Mr. Domanti's utter failure to seek a Wade hearing, to object to the in-court identifications or to cross-examine Roman with regard to a highly prejudicial show-up about which he was clearly aware constitutes such a denial of the effective assistance of counsel as was held by this Court recently in Saltys v. Adams, supra.

The District Court found Ramsey's claim of prejudice to be without merit, although admittedly, "the point

has weight" (233a). Whether or not an attack on the identifications would have succeeded is not the issue. What is clear is that counsel, without reason, did not even attempt to explore this fundamental defense.

C. Counsel's Failure to Grapple with the Effects of Publicity

The Fitzpatrick-Hutchinson murders raised considerable interest among the press in New York City and throughout the nation. The three major dailies profiled the lives of both the victims and of Donald Ramsey in meticulous detail A spate of news and feature articles about Miss Fitzpatrick, her family and friends, the "hippie" movement and drug subculture with which she was involved, and Ramsey occupied the media for several weeks. (Levit Affidavit at Exhibit 5). Heavy emphasis was placed upon the lurid aspects of the crimes and of Ramsey, and photographs of the basement in which the bodies were found, the victims and Ramsey were prominent features. Few people in New York, if not the nation, were not aware of Linda Fitzpatrick and the bizarre fate which befell her.

Despite the reams of publicity concerning Ramsey, Mr. Domanti made no motion for a change of venue from New York County where the media coverage had been most extensive and had had its most pervasive effect. Sheppard v. Maxwell,

384 U.S. 333, 352-53 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963).

Ramsey was tried for the robbery of the Project Liquor Store just 4 1/2 months after the murders which had attracted such extensive publicity. Indeed, more than two years later, Ramsey's new counsel, William Crain, unsuccessfully sought to have the murder charges dismissed on that ground and did successfully have the press barred from the proceedings involving Ramsey and the Fitzpatrick-Hutchinson murders (Levit Affidavit ¶7 and Exhibit 6 thereto).

On the other hand, one of Mr. Domanti's acquaintances, New York Post reporter John Garabedian, to whom he had even introduced Mrs. Ramsey (177a-178a), wrote two articles about Ramsey's robbery trial which appeared in that newspaper during the course of the trial on February 28 and 29, 1968 (Trial Tr. 140-42, Levit Affidavit ¶8). Both articles referred to the Fitzpatrick-Hutchinson murders and Ramsey's then pending indictment, the rape charges and to Ramsey's alleged use of drugs and black nationalist affiliation. The appearance of the first on February 28, 1968 impelled the District Attorney to request that the trial judge give the jurors warning (178a-179a). However, Mr. Domanti acquiesced in Justice Murtagh's warning and made no request that the jurors be questioned by the court on the matter. The second article which appeared on February 29, passed completely

without comment. At no time were the jurors sequestered and the articles were readily available to them. Regretfully no record of their reaction to or knowledge of the articles was made by counsel and such record might have been of crucial importance to any appeal of Ramsey's conviction (179a). Irvin v. Dowd, 366 U.S. 717, 727 (1961); Rideau v. Louisiana 373 U.S. 723, 725 (1963); United States ex rel. Bloeth v.Denno, 313 F.2d 364, 372 (2d Cir.), cert. denied, 372 U.S. 978 (1963).

In the quite recent case of United States v. Rattenni, 480 F.2d 195 (2d Cir. 1973), the Second Circuit held that the publication during the course of a criminal trial of both a news story and radio broadcast concerning the defendant's prior conviction was sufficient grounds for reversal of the conviction appealed from:

> "We believe that this record unquestionably shows that there was taint upon the verdict returned against Rattenni on the conspiracy charge. With six jurors having heard the publicity, the jury could not continue to deliberate impartially even though only one juror admitted prejudice. * * * we are unable to agree with the Government that 'Mrs. Metz's testimony was clear that the Daily News articles had not prejudiced her.' On the contrary, she was never asked if the article biased her and made no disclaimer sua sponte. * * * Moreover, no disclaimer by Mrs. Metz of prejudice on the previous day can be implied simply by her failure expressly to admit bias since this likely resulted from the failure to put the question to her and the normal juror's disinclination to impeach his rendered verdict especially where his impartiality has not been squarely challenged." 480 F.2d at 197 (Footnote and citations omitted.) (Emphasis added.)

See also Marshall v. United States, 360 U.S. 310, 312 (1959).

In Rattenni, the District Court undertook sua sponte to poll the jurors on the effect of a prejudicial article and broadcast which appeared during the course of the trial. Here, neither did the Court initiate sua sponte nor did Mr. Domanti request such a rudimentary procedure.

The District Court found that "the resolution of this problem [the handling of in-court publicity] was not ideal" (237a), but:

> "It seems unlikely, however, that there was prejudice * since the two articles appear to have recounted mainly evidence the jurors had heard in the courtroom, including the outstanding murder charge against the petitioner which was highlighted in defense counsel's strategy" (Id)**

In short, the District Court held that because Mr. Domanti had informed the jury himself, the references in the news articles could have wrought no additional harm to Ramsey, already viewed by the jurors, at the insistence of counsel, as the perpetrator of a horrible crime. All of these occurrences merely point up counsel's essential neglect of the welfare of his client. The effects of the references to the Fitzpatrick-Hutchinson murders upon the jurors and

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* In Estes v. Texas, 381 U.S. 532, 542-43 (1965), the Supreme Court set aside a conviction despite the absence of any showing of prejudice to the defendant as a result of extensive publicity about the trial.

** Mr. Domanti made repeated references to the Fitzpatrick-Hutchinson murders during the course of the trial.

their potential effect on the verdict, simply cannot be measured.

Secondly, the District Court found that the failure to request a change of venue had to be viewed in light of the fact of counsel's use of publicity to impeach the witnesses (236a).* The prejudicial effect of counsel's use of such publicity to impeach is utterly without rational basis and the effects of such references on the jury far outweighed their effect, if any, in impeaching the witnesses' identifications.

D. Counsel's Failure to Protect the Record on Appeal

Counsel, who conceded at hearing his lack of experience in felony cases (126a-127a) and, moreover, admitted that he had been disciplined by the Grievance Committee of the Bar Association for three separate offenses involving both the State and Federal courts (156a-160a) failed to take a number of elementary steps to protect the record of Ramsey's trial on appeal. He failed, for example, to record the voir dire (181a) because he testified that he did not know that he should have (181a-182a). He failed to have a record made of conferences between the bench and counsel (178a-180a).

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* Counsel attempted to show at trial that neither of the witnesses selected Ramsey as the perpetrator until after he had been arrested for the Fitzpatrick-Hutchinson murders (Trial Tr. 224, 229).

He requested no adjournments in order to attempt to find alibi witnesses after Mrs. Ramsey was unsuccessful in her attempt to reach them during the luncheon recess (186a-187a). He failed to except to the judge's charge to the jury or his marshalling of the evidence nor did he offer a charge of his own (194a). Further, as aforesaid, he did not object to the identification testimony of the witnesses (Point B supra), nor did he obtain the grand jury minutes (171a). Mr. Domanti made no efforts to interview either of the prosecution's witnesses (188a) nor any of the police officers involved (189a). See United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973). Lastly, counsel failed entirely to perfect an appeal on Ramsey's behalf or to take straightforward steps to ensure that the opportunity was not lost, even if he was unwilling to continue in Ramsey's behalf (125a).

CONCLUSION

The record in this case amply illustrates that Ramsey's counsel was so horribly inept that he was denied his rights to the effective assistance of counsel guaranteed by the Constitution. We respectfully urge this Court to reverse

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ATTORNEY GENERAL

the order of the District Court and remand to the District Court with direction that a writ of habeas corpus issue.

New York, New York
August 5, 1974

Respectfully submitted,

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